However, perhaps the most unsettling aspect of the court of appeals' decision is the chilling effect it is likely to have on economic development in Michigan.

Uncertainty is perhaps the biggest obstacle to the success of any economic development initiative. If the holding of the decision below is not reversed or modified significantly, it will create uncertainty as to the validity of various Michigan economic development incentives. This will undoubtedly have a negative impact on Michigan's ability to compete with other states, and on an international level. The potential impact on the programs the MEDC administers is extraordinary. Over the past nine years, the State of Michigan has awarded incentive tax credits to 220 business expansion and retention projects which are expected to generate over $11 billion in capital investment and result in the direct creation of 56,100 jobs through the year 2025. Using REMI Policy Insight, a nationally recognized econometric forecasting and policy analysis model, the State of Michigan has projected the creation of 62,301 additional indirect jobs. Total personal income generated as a result of the new jobs will be $82.7 billion, and state revenues are projected to increase $5.4 billion, net of the cost of the credits. Based on actual experience to date with the 65 projects on which credits have been collected, 13,443 direct jobs have been created paying average annual wages of $37,149.

CONCLUSION

For the foregoing reasons, the MEDC respectfully requests that this Court grant the Petitions for a Writ of Certiorari filed by DaimlerChrysler Corporation and the State of Ohio.

Respectfully submitted.

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BRIEF OF *AMICUS CURIAE* NATIONAL GOVERNORS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is submitted in support of the petitioners. Letters of consent to the filing of this brief have been submitted to the Court.[1]

The National Governors Association ("NGA") is the bipartisan organization of the nation's governors. Its members include the governors of all 50 states and five territories. NGA provides governors and their senior staff members with services that range from representing states on Capitol Hill and before the Administration on key federal issues to developing policy reports on innovative state programs and hosting networking seminars for state government executive branch officials. Additionally, the NGA Center for Best Practices focuses on state innovations and best practices on issues that range from education and health to technology, welfare reform, and the environment. NGA also provides management and technical assistance to both new and incumbent governors.

NGA has an interest in this matter because the Sixth Circuit's decision calls into question the constitutionality of tax incentives in virtually all 50 states. These tax incentives are one of the primary tools governors use to promote economic development and job growth in the states. Accordingly, as the collective voice of the nation's governors, NGA strongly supports Ohio's petition for a writ of certiorari.

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[1] No counsel for any of the parties authored this brief in whole or in part. Furthermore, no person or entity, other than *amicus curiae*, its members or its counsel, made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Review by this Court is urgently necessary because the Sixth Circuit's decision jeopardizes tax incentives in virtually all 50 states. These tax incentives are one of the primary tools that governors use to encourage investment and promote job growth. State tax incentives are vital given the tremendous economic impact they have, and given the increased competition states face for limited investment resources in today's global economy. Furthermore, the Sixth Circuit's decision impermissibly invades the states' sovereign functions of taxation and economic development – all based on an admittedly "novel" theory of constitutional law, which even critics of state tax incentives have conceded is ill-conceived and leads to "odd" results.

A decision based on such tenuous grounds should not be permitted to stand, particularly considering the enormous uncertainty the decision has created nationwide and its potentially disastrous consequences. Accordingly, NGA respectfully submits that review by this Court is urgently needed now to clarify the states' authority to foster economic development and job growth through tax incentives. Given the nationwide uncertainty created by the Sixth Circuit's decision, piecemeal litigation of the various states' tax incentives is not tenable.[2]

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[2] DaimlerChrysler Corporation has also filed a petition for a writ of certiorari. See Supreme Court Case No. 04-1704, *DaimlerChrysler Corporation v. Cuno*. *Amicus curiae* supports the petition of DaimlerChrysler Corporation for the same reasons stated in this brief.

ARGUMENT

I. The Sixth Circuit's Decision Jeopardizes Tax Incentives Nationwide.

Immediate review of the Sixth Circuit's decision is urgently necessary because, as numerous commentators have noted, the decision has called into question the constitutionality of state tax incentives throughout the nation. "The full impact of [*Cuno*] is yet to be known, but it creates immediate and significant uncertainty regarding the availability of credits and similar incentives in Ohio and many other states." Timothy H. Gillis, *Sixth Circuit Bans Ohio Tax Credit Under The Commerce Clause, Casting A Pall On Incentives*, 101 Journal of Taxation 359, 362 (2004). See also Laura Lee Mannino, *Ohio Investment Tax Credit Struck Down*, 199 Journal of Accountancy 76, 77 (2005) (*Cuno* "serves as a warning to other states. Unless the Supreme Court grants certiorari and says other-wise, investment tax credits based on the location of an investment are constitutionally impermissible."); Richard Sammon, *Ohio Court Ruling Imperils Breaks For Businesses*, 617 Kiplinger Business Forecasts at *1 (Lexis Academic June 16, 2005) (*Cuno* "is sending shock waves throughout the country. As much as $50 billion in combined tax incentives given to corporations by state and local governments-including investment and job creation tax credits, capital improvement bonds, property tax exemptions and reduced corporate tax rates-could be in jeopardy if the lower court ruling stands.").

This level of uncertainty is unacceptable given the central role that tax incentives play in the states' efforts to foster economic development and job growth. "[T]ax incentives have traditionally been, and continue to be, the most commonly used inducement to encourage business activity and investment." Laura A. Tomaka, *In Search Of Growth: Business Incentives In The Midwestern States*

(Council Of State Governments Nov. 1998) at 7.[3] Furthermore, the economic impact of state tax incentives nationwide is tremendous. State tax incentives amount to an estimated $50 billion annually. Sammon, *supra*, at *1. These tax incentives, in turn, spur an even greater amount of investment by corporations.

The states within the Sixth Circuit dramatically illustrate this point. Ohio's investment tax credit, for example, has generated $30 billion in new investment. See Ohio's Pet. For Cert. at 23. Similarly, Michigan's tax credit program has generated approximately $11 billion in capital investments, more than 55,000 new jobs, and more than $2 billion in annual payroll; Kentucky's tax credit program has generated $10.8 billion in capital investment, more than 75,000 new jobs, and more than $2 billion in annual payroll; and Tennessee's tax credit program has generated over $17 billion in capital investment, created more than 94,000 jobs, and generated more than $4 billion in annual payroll. See Brief Of Amici Curiae State Of Michigan, Commonwealth Of Kentucky, And State Of Tennessee In Support Of Appellees' Suggestion For Rehearing *En Banc* (Sixth Circuit Case No. 01-3690).

Given the high level of uncertainty created by the Sixth Circuit's decision and the tremendous amount of economic benefits at stake, piecemeal litigation of the various states' tax incentives is not appropriate. This Court should accept review now and end the uncertainty that currently surrounds state tax incentives – one of the primary tools used by states to spur economic development and job growth.

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[3] Available at www.csgmidwest.org/MemberServices/Publications/Reports Newsltrs/InSearch.pdf.

II. The Sixth Circuit's Decision Prevents States From Competing In The Global Economy.

Review of the Sixth Circuit's decision is also urgently necessary because tax incentives are a vital tool states use in the competition for limited investment resources in today's global economy. Like the states, foreign countries also compete for investment through the use of tax incentives. The Province of Ontario, Canada, for example, "lists Ohio as a chief competitor [and] offers at least nine tax incentives to encourage investment." Bruce Johnson, Testimony Before The U.S. House Judiciary Subcommittee On The Constitution (May 24, 2005).[4] Given this economic reality, states are often forced to "offer incentives in order . . . to compete, not only with other states but also with countries like Canada and Mexico." *Id.*

Corporations, of course, are keenly aware of this competition, and actively seek to obtain tax incentives in exchange for investing within a state. A major computer manufacturer, for example, considered moving "its planned $100 million facility offshore if state officials didn't waive corporate income taxes." Michael Schroeder, *States Pay Steep Price To Attract Industry*, The Wall Street Journal, June 29, 2005, at A4. Similarly, Nissan North America decided to expand its facilities in Tennessee, rather than Mexico, only after Tennessee offered substantial tax incentives. See Brief Of *Amicus Curiae* Nissan North America, Inc. In Support Of Defendants-Appellees' Petition For Rehearing *En Banc* at 4 (Sixth Circuit Case No. 01-3960). The resulting benefits were not one-sided: Nissan North America invested more than $1 billion in Tennessee – rather than in Mexico – resulting in approximately 1,000 high paying Tennessee jobs. *Id.*

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[4] Available at www.odod.state.oh.us/newsroom/releases/1254/asp.

In summary, states are forced to offer tax incentives in order to compete in today's global economy. This is the economic reality. If the Sixth Circuit's decision is allowed to stand, foreign countries will still continue offering tax incentives. The states, however, will be disadvantaged in their ability to respond by offering their own tax incentives. It should then come as no surprise when corporations make their investments somewhere other than the United States. This Court should accept review now to address the untenable situation created by the Sixth Circuit's decision.

III. The Sixth Circuit's Decision Invades State Sovereignty.

Finally, review of the Sixth Circuit's decision is appropriate because the decision impermissibly invades the states' sovereign functions of taxation and economic development. This Court has previously recognized that "the taxation authority of state government" is "central to state sovereignty[,]" *Dep't Of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994), and that states may structure their "tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). Despite these seemingly irrefutable principles, the Sixth Circuit's decision intrudes on state sovereignty on the basis of a theory, which respondents themselves labeled as "novel." Appellants' Brief at viii (Sixth Circuit Case No. 01-3960). Even critics of state tax incentives have conceded the Sixth Circuit's decision is "not good law" and leads to "odd" results. Chris Atkins, *Cuno v. DaimlerChrysler: A Pyrrhic Victory For Economic Neutrality*, (The Tax Foundation 2005).[5]

A decision based on such tenuous grounds should not be permitted to stand, particularly considering the enormous

[5] Available at www.taxfoundation.org/publications/show/344.html.

uncertainty the decision has created nationwide and its potentially disastrous consequences. Piecemeal litigation of the various states' tax incentives is not appropriate under these circumstances. Accordingly, as the collective voice of the states' governors, NGA respectfully submits that review of the Sixth Circuit's decision is an urgent matter, requiring this Court's involvement now.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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